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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 178.

BALTIMORE & CAROLINA LINE, INC.,

Petitioner,

—against—

DONALD REDMAN,

Respondent.

BRIEF FOR RESPONDENT.

This Court, on petition of defendant, has granted a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit, which on defendant's appeal, reversed a judgment for plaintiff entered on a jury's verdict in a negligence action.

Defendant in the trial court had moved for a new trial and had assigned error in its denial. The Circuit Court of Appeals in reversing granted defendant a new trial. It seeks a review of that portion of the decision.

Plaintiff-respondent who also petitioned this court for certiorari, with the entire record before the court, asserts error in the reversal and asks that the judgment of the trial court be affirmed.

Statement.

The Evidence on the Trial.

The Accident.

The plaintiff, a Barbadoes negro cook aboard the "Frances Weems", arrived in Brooklyn, with the vessel, on 12 February 1930. The vessel was loading for San Domingo

and left without the plaintiff, on 15 February 1930 (R., p. 62, fol. 78; p. 238, fols. 289, 295).

At five o'clock in the morning of 13 February, the plaintiff, who lived aft on the boat, came up on deck dressed to go forward and begin his work. There were no lights on the deck, no light on the well deck where the ladder was. He walked to the end of the ladder, tripped over some broken boxes, felt a sharp pain in his foot. A nail at the end of a slat had run into his foot just above his low shoe. He went to the kitchen, took off his shoe and sock. It bled. He took a clean rag and warm water, washed it and continued with his work. "I thought nothing more." Blood was coming from where the sock joined the shoe (R., p. 63, fol. 80; p. 65, fols. 82-87). It did not bleed very much. It was a "slant puncture" of the skin. It could not be a quarter of an inch deep (R., p. 68, fol. 86; p. 86, fol. 107).

After six o'clock that morning he went back and saw the crushed boxes with nails in them (R., p. 69, fol. 86). There is corroboration that the broken boxes and debris were there and allowed to remain there until the vessel got to sea, and that the duty to clean up had not been performed (Burrows, R., p. 36, fol. 50; pp. 43-46, 47-49, 58-61; Ramsey, R., p. 197, fol. 242).

The Progression of the Injury.

On the day of the accident, 13 February, the plaintiff felt nothing wrong or sore with his foot (R., p. 69, fol. 87).

On the morning of 14 February he noticed his foot was swollen and discolored where the nail went in, but no sharp pain came from it. That night he went ashore with the steward, Ramsey. His foot hurt him during the night. There was sharp pain. He could not sleep (R., p. 71, fols. 89, 90, 91).

On the morning of 15 February his foot was so swollen he could hardly get his shoe on. He felt so bad he did not know what to do. The pain made him lame. He took

a taxi to the boat but she had sailed half an hour before (R., p. 72, fol. 91). His clothes were on the ship. He never got them back (R., p. 116, fol. 142).

He sat in a room for 4 days and nights, not going out at all, and in another room for 2 days with his foot no better and on 21 February asked his landlord to get a policeman. He had a high fever. His foot was swollen and had sharp pains in it (R., pp. 72, 73, fols. 91, 92, p. 97, fols. 119, 123).

The hospital record shows he came to the hospital in an ambulance (R., p. 148, fol. 182).

Gangrene. No Doubt as to Diagnosis.

As soon as plaintiff arrived at the hospital in the ambulance, Dr. Perez notified the chief nurse that it was a case of gangrene (R., p. 148, fol. 182). It started at the toes of the foot, and extended to about the middle of the arch (R., p. 217, fol. 264). There was an unsuccessful preliminary operation and on 17 April 1930 his leg was amputated (R., p. 14, fol. 23).

Proximate Cause.

Dr. Charache, one of the doctors who treated plaintiff in the hospital, testified for the defendant. He stated on cross examination that a traumatic injury may be a competent producing cause of dry gangrene, providing arteries are diseased (R., pp. 222-224, fols. 271, 273). (Plaintiff had, so the hospital investigation showed, diseased arteries, and the hospital doctors diagnosed his gangrene as the dry variety.) Dr. Charache testified the plaintiff had an obstruction in the flow of the blood and that if the leg is struck, or is too hot or too cold, with diseased arteries there may be gangrene in that part (R., pp. 222-224, fols. 271, 273). "Nail plus heat" could here be the cause of the gangrene (R., p. 228, fol. 278).

Dr. Newstadter, for plaintiff, to the same effect, and that the accident was the competent producing cause of the amputation (R., pp. 119-121, fols. 145, 148, pp. 125-127, fols. 153-155).

Dr. Takama, the hospital consultant in the plaintiff's case, was not called by either side, but entered on the record "Gangrene of the foot; may not be leutic cause." That is, may not be a syphilitic cause (R., p. 27, fol. 38).

Dr. Wikle testified that the slightest scratch, sufficient to draw blood can be a competent producing cause of gangrene where the arteries are diseased and that the stoppage of the blood in the arteries might have been caused by the prick of a nail (R., p. 22, fol. 33, p. 35, fol. 48). Infection as a result of the nail would be a competent producing cause (R., pp. 31, 32, fol. 44).

Dr. Perez, to practically the same effect (R., p. 161, fol. 198).

Plaintiff's Failure to Make Self-Serving Declarations (Asserted in Opinion Below to Constitute Contradictory Conduct).

(a) To Doctors in Hospital.

The Spanish doctor, Perez, who took his statement when he was admitted to the hospital, purported to testify to what plaintiff *had not told him,* three years before the trial. He testified that he first asked him questions "in relation to accident, how it happened and all thus far". He wanted to refresh his recollection by his statement. He then volunteered the information:

> "Then he claimed while he was working on some steamship line he felt a few sharp pains in the foot and never mentioned to me any accident."

Judge Bondy warned him, "You are a doctor, a man of intelligence; don't tell us what he did not mention; tell us

what he did mention" (R., p. 145, fol. 179, p. 147, fol. 180, p. 148, fol. 182).

Dr. Perez *condensed* his story and claimed that he had had to repeat all questions two or three times (R., p. 151, fol. 186). His condensation is not in evidence and we do not know what matters he regarded important and the character of answers he obtained.

Plaintiff was, according to Dr. Perez, suffering from sharp pains at the time (R., p. 148, fol. 182). Plaintiff testified he told the doctor what happened but that the doctor did not talk very good English, and as to half the questions plaintiff did not know what he was talking about. Plaintiff was not allowed by defendant's attorney to state on the stand what he had told Dr. Perez. It was not responsive (R., p. 90, fol. 111).

Judge Manton, in his dissenting opinion, has remarked upon the hostility of Dr. Perez, the fact that he did not make out his report the day he made his examination, his inability to understand English and the probability of his misunderstanding the plaintiff (R., p. 280).

Dr. Wikle did not talk to plaintiff about his foot (R., p. 90, fol. 112), and as the prevailing opinion below states, neither Dr. Charache nor Dr. Shatara could say that they had ever asked plaintiff about the history of his case (R., p. 276, fol. 345).

(*b*) *Failure to Speak of Nail to Boat Medical Examiner.*

The medical examiner did not testify.

The plaintiff testified that the medical examination was made on 14 February. It was for the voyage and was limited to venereal disease (which plaintiff did not know he had). Those who were going on the ship had to "go past the doctor". The doctor did not see the foot. He did not tell the doctor it was paining him at the time. The doctor said, "Next, next", and had no time (R., p.

70, fol. 88; p. 92, fols. 113, 114; p. 101, fol. 124; p. 112, fol. 137).

This was the day after the accident and at that time plaintiff had little pain and was not concerned about it (R., p. 70, fol. 88).

(c) Denial by Steward That Plaintiff Told Him of Nail.

Plaintiff testified on the day following the accident he had told the steward he had run a nail in his foot but that he "didn't think anything serious", and that the steward suggested liniment (R., p. 70, fol. 88).

The colored steward testified for defendant that he was not a person to whom accidents should be reported, that he had never had an accident reported to him: "No, sir, not to take any note of it" (R., p. 205, fols. 250, 251).

He had before the trial, in writing, offered to sell his testimony to the plaintiff (Pltffs.'s Ex. 5, p. 263).

(d) The Affidavit Taken by Suessmuth.

Plaintiff, over a year after the accident, made two affidavits of statements given to an adjuster of the defendant (Deft.'s Exs. B and C, pp. 264-268).

Plaintiff testified he told him as he had told it on the stand. He took the statement; said "Sign here", and plaintiff had signed without reading it (R., p. 108, fol. 132).

The affidavits are headed "Alleged injury to Donald Redman". The adjuster testified that when plaintiff came to him he had no other information about the case (R., p. 167, fol. 205). He was later recalled to the stand at the suggestion of the foreman of the jury who brought out that he had gone to the hisptal and had gotten the clinical record (R., pp. 185, 186, fol. 228). Within a week after the affidavits were signed, the plaintiff wrote Suessmuth a letter "as you is representing the Bull Line I only want to know what is their intention toward me

because I am crippled by their ship. * * *"* (Deft.'s Ex. A, p. 264).

Conflicting Medical Opinion as to Visibility of Puncture Nine Days After Accident (Stated in Opinion Below to Constitute an Uncontradicted Physical Fact).

The opinion asked the hospital doctors as to visibility did not reflect the plaintiff's testimony. He had testified:

> "Q. Was the wound a puncture or long scratch? A. It was a puncture of the skin, slant puncture. * * *
>
> Q. Was it a quarter of an inch deep? A. No it could not be; it was the skin.
>
> Q. A long scratch? A. Yes, scratch" (R., p. 86, fol. 107).

What he is led to say was a scratch after he had, in his own phrase, called it a "slant puncture", he indicated was what the reporter states is one and one half inches (R., pp. 86, 87, fols. 107, 108). It looked similar to a scratch but it ran right in the flesh at a slant. It was not a deep wound. It was discolored and red and that is all (R., p. 104, fol. 128, p. 118, fol. 144).

After he bathed his foot in warm water the scratch seemed to form a kind of blister and the blister and skin peeled right off. It was kind of red (R., p. 87, fols. 108, 109).

When Dr. Charache saw the foot in the hospital (the time he could not place, R., p. 217, fol. 264) the gangrene had extended above the middle arch of the foot. There were blisters above it with no sharp line between the blisters and the good flesh. The doctor was of the opinion that he had a burn from the hot water he had soaked it in. The skin was bruised and "all broken" (R., pp. 217, 228, fols. 264, 268, 278). He did not recall seeing a wound or

scratch deep enough to bleed, 1½ inches long (R., pp. 218, 219, fols. 266, 267).

Dr. Shatara (who was not connected with the hospital until March 1930 [R., p. 230, fol. 280] and so had not seen the leg until at least 10 days after plaintiff's arrival at the hospital) testified that the blister burns on his foot at point of entrance of the wound would be enough to obstruct it (R., p. 235, fol. 285).

Dr. Wikle said the skin was broken there. He did not look under the skin to see whether there was a puncture. Some of the blisters had broken. He did not look for any abrasion and could express no opinion as to the visibility of an abrasion eight or nine days old (R., pp. 16, 21, fols. 25, 31, 33).

Dr. Newstadter testified that gangrene is of a bluish discoloration, that inflammation may be without pus and is characterized by redness, swelling and heat; that if the blisters had come where the scratch was you could not see the scratch (R., pp. 133-138, fols. 162, 164, 165, 168).

Summary of Argument.

I.

The Circuit Court of Appeals properly refused to direct a dismissal "without prejudice".

II.

The defendant cannot now complain of the direction for a new trial and is not, in this court, and on this record, entitled to a direction of dismissal on the merits.

III.

The Circuit Court of Appeals erroneously reversed. This Court should now affirm the judgment of the District Court.

(a) failure to make self-serving declarations was of no probative value.

(b) opinion evidence as to visibility of puncture was of no probative value.

POINT I.

The Circuit Court of Appeals properly refused to direct a dismissal "without prejudice".

The jurisdiction of the Circuit Court of Appeals was purely appellate—in correction of errors of the trial court. The trial court was never asked to dismiss "without prejudice". That question was never raised in the trial court.

The motion made to dismiss at the end of the plaintiff's case was without qualification, and under New York Civil Practice Act §482, called for a dismissal on the merits. Defendant argued two grounds (1) that there was no evidence who put the boxes there and (2) that there was no evidence that the gangrene was caused by the wound. He

was asked to state further grounds and said he had none. He said "Of course, the credibility would be for the jury" (R., pp. 142-145, fols. 174-178).

Defendant acquiesced in decision being reserved to the end of the entire case, and then renewed the motion but no additional grounds were added and no qualification made in the previous grounds urged (R., p. 260). Without pressing "admissions by conduct" too far the defendant with a duty to speak, here specifically admitted that credibility of the plaintiff was for the jury.

Had the trial court been asked to dismiss "without prejudice" at the end of plaintiff's case and had the complaint been thus dismissed, the plaintiff could have immediately sued over. There would have been needless delay and expense but at any rate plaintiff would not have been foreclosed. We respectfully submit, however, that a motion to dismiss "without prejudice" can only properly be made *in terms* and at the end of the plaintiff's case; that it should then be granted or refused; that if defendant goes ahead with its case it waives its motion.

Confusion of procedure is inevitable if this Court now holds that the Circuit Court of Appeals can, after verdict, grant a motion to dismiss "without prejudice" which was never made or suggested at the trial.

POINT II.

The defendant cannot now complain of the direction for a new trial and is not, in this court, and on this record, entitled to a direction of dismissal on the merits.

Defendant, after verdict, moved to set aside the verdict (R., p. 260, fol. 320) and assigned as error that the court "erred in denying defendant's motion to set aside the verdict and for a new trial" (R., p. 272, fol. 339).

On its brief in the Circuit Court of Appeals, if we read it aright, the defendant did not withdraw its assignment of error for a new trial. It requested the Court to direct the lower court to dismiss the complaint without prejudice, or, if in doubt as to its power, to certify the question to this court.

The question of the power of the Circuit Court of Appeals to dismiss upon the merits without granting a new trial (as distinguished from the less extreme but therein requested dismissal "without prejudice" which would allow of suing over) is, we respectfully submit, too important to be decided upon such a doubtful record. The power was not, at any rate, clearly invoked in the Circuit Court of Appeals.

The procedure in regard to special verdicts, under New York Civil Practice Act, §459, was not followed. Even had it been followed it is entirely inapplicable where there is a conflict of evidence. Where a verdict is set aside as against the weight of evidence there must be a new trial.

In *Greenpoint Nat. Bank* v. *Gilbert*, 237 N. Y. 19, the Court, of this section at page 23 said:

> "When the jury had rendered its verdict the court could have set the same aside on the ground that it was against the weight of evidence, in which case there would have been a new trial, but he could not, in view of the conflict, direct a verdict as he did."

The Circuit Court of Appeals on the weight of evidence had no power to review the action of the district court in refusing to grant a new trial.

Fairmount Glass Works v. *Coal Co.*, 287 U. S. 474 at 481 and cases cited.

POINT III.

The Circuit Court of Appeals erroneously reversed. This court should now affirm the judgment of the District Court.

By the operation of the writ of certiorari the entire record is now before this Court with power to decide the case as it was presented to the Circuit Court of Appeals. This Court may now direct such disposition of the case as the Circuit Court of Appeals might have done, including the affirmance of the judgment of the District Court.

Langnes v. *Green*, 282 U. S. 531, 536.

The respondent having seasonably petitioned this Court for certiorari, although this Court is not *bound* to do so, it may consider claimed error in the decision below.

Langnes v. *Green*, 282 U. S. 531, 536, 537, 538;
Alexander v. *Cosden Co.*, 290 U. S. 484 at 487.

See also *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, where, on certiorari this Court in reversing the Circuit Court of Appeals and in affirming the District Court considered respondent's assignments of error made on appeal from the District Court.

The case is important in presenting the question of the quantum of evidence requisite to get a jury trial. The rule of the prevailing opinion is new and, as the dissenting opinion states, is destructive of jury determination.

The generally accepted rule has been stated in *Hull* v. *Littauer*, 162 N. Y. 569, 572, that if the evidence of a party is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and is not opposed to the probabilities, nor in its nature surprising or

suspicious, there is no reason for denying to it conclusiveness.

The other situation, where the evidence of a party is not contradicted by direct evidence but by circumstantial evidence, is stated as follows (p. 572):

> "If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it."

The direct evidence upon one side may be so overwhelming that it overcomes evidence of the other side based upon mere speculative inferences. A good instance is *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, cited in the prevailing opinion below (R., p. 278), where testimony of three eyewitnesses that there was a collision overcame speculative inferences from evidence of a person not in a position to see, and paying no attention.

In the case at bar the testimony of the plaintiff that he had run a nail in his foot from boxes allowed to litter the deck was direct. It was uncontradicted by any direct evidence. It was corroborated by testimony that the boxes were there and by the fact that the foot developed a logical sequence of symptoms starting with pain.

The defendant's theory traces back from gangrene to blisters and from blisters to hot water and there stops. Why did he apply the hot water?

Petitioner at page 28 of its brief herein in terms states that it is a "*conceded fact* that respondent bathed his foot in *hot water* on February 13, 1930". Will it concede the fact but insist that the only possible cause that has been suggested and sworn to, is incredible? How can petitioner concede that part of respondent's story without taking the inevitable consequences of the concession?

(a) *Failure to make self-serving declarations was of no probative value.*

The evidence which the Court of Appeals has held overwhelms this direct evidence is a series of speculative inferences not ordinarily considered as having any probative value whatsoever. It is the failure on the part of the plaintiff to make self-serving declarations which, had he made them, would have been inadmissible.

He was brought to the hospital in an ambulance. He was in great pain. He was a voluble and ignorant negro sailor questioned by an arbitrary, impatient and undoubtedly hurried Spanish doctor. The doctor saw at a glance that it was gangrene. Did the *cause* of the gangrene have medical significance to such a doctor on such an examination? When he discovered that plaintiff had syphilis, is there any indication that he asked him how he got it? Can it be inferred that plaintiff had such a knowledge of things medically significant that he would insist on telling his own story in his own voluble way instead of attempting to answer merely the questions which were asked him and which he only half understood?

The leg was not yet off. At that time, as both a matter of fact and of psychology, the nail had no legal significance. Silence under such circumstances is too uncertain and variable to constitute contradictory conduct. There is not shown any duty to speak. Nor was there shown any opportunity to speak. The silence was of doubtful probative value.

Walter v. *Laidlaw*, 249 N. Y. 46, 51;
People v. *Collins*, 234 N. Y. 355, 365;
Lord Electric v. *Edison P. C. Co.*, 234 N. Y. 411, 416;
People v. *De Paulo*, 235 N. Y. 39, 41, 42.

A great deal in regard to these matters depends on the personality of Dr. Perez and of Redman. Trial court and jury are in a better position to judge, than an appellate court. But even on the printed page the testimony of Dr. Perez gives some indication of what must have been the manner of the questioning. The examination could not have given much leeway to the patient.

So many speculative and contradictory inferences may be drawn from the fact (if fact it be) that Redman did not mention the scratch to Dr. Perez that that silence should be held to have no evidentiary value. To give it evidentiary value would lead to absurdity. Redman might tell 99 people about the nail and one person he might not tell. The court would not receive his 99 statements. They would be self serving. But would he be a liar if a man could be produced to whom he had *not* told of the nail?

(b) *Opinion Evidence As to Visibility of Puncture Was of No Probative Value.*

The second class of evidence which the Court below held so overcame plaintiff's direct testimony that the verdict should be set aside was, what is called a physical fact, that the scratch was not visible when he reached the hospital. This we respectfully submit was in reality merely opinion testimony where the hypothesis was not correctly submitted.

It was established that the prick of a nail could cause an obstruction in diseased arteries with resultant gangrene. Dr. Wikle did not look for an abrasion and could not express an opinion as to the visibility of an abrasion 8 or 9 days old. Dr. Shatara was of opinion that the blisters would be enough to obstruct it. These doctors were in the difficult task of recollecting and describing a confused grouping of healthy brown, inflamed red, and bluish gangreneous skin in an area of approximately 9 square inches

three years after an operation, as a basis of inference as to whether there had been a "slant puncture" in the skin which bled a little, in a period anywhere from 8 or 9 days to 3 weeks before their period of observance. Not one of them looked for the puncture that plaintiff swears was, or rather, had been, there. No one of the doctors had a recollection which precluded its former presence. That they would have seen it had it been the different thing defendant placed in its hypothesis was faulty opinion evidence which did not so supplement their vague argumentative and negative recollection as to constitute physical fact evidence.

The dissenting opinion of Judge Manton below (R., pp. 279-281) tersely reviews the conflict of evidence and shows that a typical jury issue was presented; that there is no justification in any previously formulated rule or reported case in destroying the jury's determination where direct evidence of a plaintiff finds nothing against it save speculative inferences.

Hemming v. Corley 281 U.S. 90

POINT IV.

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 178.—October Term, 1934.

Baltimore & Carolina Line, Inc., Petitioner, *vs.* Donald Redman.	Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 3, 1935.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action in a federal court in New York to recover damages for personal injuries allegedly sustained by the plaintiff through the defendant's negligence. The issues were tried before the court and a jury. At the conclusion of the evidence the defendant moved for a dismissal of the complaint because the evidence was insufficient to support a verdict for the plaintiff, and also moved for a directed verdict in its favor on the same ground. The court reserved its decision on both motions, submitted the case to the jury subject to its opinion on the questions reserved, and received from the jury a verdict for the plaintiff. No objection was made to the reservation or this mode of proceeding. Thereafter the court held the evidence sufficient and the motions ill-grounded, and accordingly entered a judgment for the plaintiff on the verdict.

The defendant appealed to the Circuit Court of Appeals, which held the evidence insufficient and reversed the judgment with a direction for a new trial.[1] The defendant urged that the direction be for a dismissal of the complaint. But the court of appeals ruled that under our decision in *Slocum* v. *New York Life Insurance Company*[2] the direction must be for a new trial. We granted a petition by the defendant for certiorari because of the last ruling and at the same time denied a petition by the plaintiff challenging the ruling on the insufficiency of the evidence.[3]

The Seventh Amendment to the Constitution prescribes:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,

[1] 70 Fed. (2d) 635.
[2] 228 U. S. 364.
[3] 293 U. S. x, XVIII.

and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted. The Amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reexamination existing under the common law, and to that end declares that "no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.[4]

In *Slocum* v. *New York Life Insurance Company* a jury trial in a federal court resulted in a general verdict for the plaintiff over the defendant's request that a verdict for it be directed. Judgment was entered on the verdict for the plaintiff and the defendant obtained a review in the court of appeals. That court examined the evidence, concluded that it was insufficient to support the verdict, and on that basis reversed the judgment given to the plaintiff on the verdict, and directed that judgment be entered for the defendant. A writ of certiorari then brought the case here. The question presented to us was whether, in the situation disclosed, the direction for a judgment for the defendant was an infraction of the Seventh Amendment. We held it was and that the direction should be for a new trial.

It therefore is important to have in mind the situation to which our ruling applied. In that case the defendant's request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence or of any other matter; and the verdict for the plaintiff was taken unconditionally, and not subject

[4] Walker v. New Mexico, &c. R. R. Co., 165 U. S. 593, 596; Gasoline Products Co. v. Champlin Co., 283 U. S. 494, 497-499; Dimick v. Schiedt, 293 U. S. 474, 476, 485-486.

to the court's opinion on the sufficiency of the evidence. A statute of the State wherein the case was tried made provision for reserving questions of law arising on a request for a directed verdict, but no reservation was made. The same statute also provided that where a request for a directed verdict was denied the party making the request could have the evidence made part of the record and that, where this was done, the trial court, as also the appellate court, should be under a duty "to enter such judgment as shall be warranted by the evidence". It was in conformity with this part of the statute that the court of appeals directed a judgment for the defendant.

We recognized that the state statute was applicable to trials in the federal courts in so far as its application would not effect an infraction of the Seventh Amendment, but held that there had been an infraction in that case in that under the pertinent rules of the common law the court of appeals could set aside the verdict for error of law, such as the trial court's ruling respecting the sufficiency of the evidence, and direct a new trial, but could not itself determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury.

A very different situation is disclosed in the present case. The trial court expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court. The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties. After the verdict was given the court considered the motions pursuant to the reservation, held the evidence sufficient, and denied the motions.

The court of appeals held that the evidence was insufficient to support the verdict for the plaintiff; that the defendant's motion for a directed verdict was accordingly well taken; and therefore that the judgment for the plaintiff should be reversed. Thus far we think its decision was right. The remaining question relates to the direction which properly should be included in the judgment of reversal.

At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments.[5]

Fragmentary references to the origin and basis of the practice indicate that it came to be supported on the theory that it gave better opportunity for considered rulings, made new trials less frequent, and commanded such general approval that parties litigant assented to its application as a matter of course. But whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment.

This Court has distinctly recognized that a federal court may take a verdict subject to the opinion of the court on a question of

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[5] In Carleton v. Griffin, (1758) 1 Burrow's Rep. 549, a verdict for plaintiff was taken subject to the court's opinion on questions of law, which later on were ruled in favor of defendant, whereupon a judgment for him was directed. Other early cases similarly recognized and applied the practice. Coppendale v. Bridgen, (1759) 2 Burrow's Rep. 814; Bird v. Randall, (1762) 3 Burrow's Rep. 1345; Price v. Neal, (1762) 3 Burrow's Rep. 1354; Basset v. Thomas, (1763) 3 Burrow's Rep. 1441; Timmins v. Rowlinson, (1765) 3 Burrow's Rep. 1603.

Law writers also have recognized it. 2 Tidd's Practice, (4th Am. Ed.) 900; Tidd's Practice, (London, 1837 Ed.) 538, 539; Starkie on Evidence, (10th Am. Ed.) *309; 1 Archbold's King's Bench Practice, 188, 192; Thayer's Treatise on Evidence, 241.

Later English decisions not only show the practice but also illustrate various applications of it. In Treacher v. Hinton, (1821) 4 Barn. & Ald. 413, plaintiff was non-suited with liberty to move to enter verdict in his favor, and on his motion such a verdict was ordered entered as if given by the jury. In Jewell v. Parr, (1853) 13 C. B. 909, a verdict was directed for defendant with leave to plaintiff to move to enter verdict for him if the court should be of opinion there was not sufficient evidence to sustain the verdict for defendant; and on such a motion the court held the evidence insufficient and directed entry of verdict for plaintiff. In Ryder v. Wombwell, (1868) L. R. 4 Exch. Cas. 32, a verdict was taken for plaintiff with leave to defendant to move to enter non-suit if the court should be of opinion there was lack of evidence; and on such a motion the evidence was held insufficient and non-suit entered.

law,[6] and in one case where a verdict for the plaintiff was thus taken has reversed the judgment given on the verdict and directed a judgment for the defendant.[7]

Some of the States have statutes embodying the chief features of the common-law practice which we have described. The State of New York, in which the trial was had, has such a statute; and the trial court, in reserving its decision on the motions which presented the question of the sufficiency of the evidence, and in taking the verdict of the jury subject to its opinion on that question, conformed to that statute and the practice under it as approved by the Court of Appeals of the State.[8]

In view of the common-law practice and the related state statute, we reach the conclusion that the judgment of reversal for the error in denying the motions should embody a direction for a judgment of dismissal on the merits, and not for a new trial. Such a judgment of dismissal will be the equivalent of a judgment for the defendant on a verdict directed in its favor.

The court of appeals regarded the decision in *Slocum* v. *New York Life Insurance Company* as requiring that the direction be for a new trial. We already have pointed out the differences between that case and this. But it is true that some parts of the opinion in that case give color to the interpretation put on it by the court of appeals. In this they go beyond the case then under consideration and are not controlling. Not only so, but they must be regarded as qualified by what is said in this opinion.

It results that the judgment of the court of appeals should be modified by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial, and, as so modified, should be affirmed.

Judgment modified and affirmed as modified.

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[6] Brent v. Chapman, 5 Cranch 358; Chinoweth v. Haskell, 3 Pet. 92, 94, 96, 98; Suydam v. Williamson, 20 How. 427, 434.

[7] Chinoweth v. Haskell, *supra.*

[8] New York Civil Practice Act, §§ 459, 461; Bail v. New York, New Haven and Hartford R. R. Co., 201 N. Y. 355; Dougherty v. Salt, 227 N. Y. 200, 203.